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No. 86-1801

In the Supreme Court of the United States

OCTOBER TERM, 1986

IRVIN JAMES HUNTZINGER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that he was wrongfully removed from active duty in the Army in 1960. The decision below, which rejected petitioner's challenge as untimely filed, is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

1. Petitioner served in the United States Army Air Corps from 1946 through 1956. In January 1957, he was honorably discharged from enlisted service in the Army and entered active duty as a second lieutenant in the United States Army Reserve. Following the receipt of several sub-standard Officer Efficiency Reports (OERs), petitioner was released from active duty in June 1960. Pet. App. 39-44.

In 1962, after his release from active duty, petitioner was promoted to the grade of captain in the Army Reserve. In 1968, he returned to active duty for a 296-day limited tour. During this limited duty tour, petitioner was found to be medically unfit for further active duty service due to a heart condition. After a number of evaluations

and appeals, the Army again released petitioner from active duty and in 1970 placed him on disability retirement at a 30% disability rating. Pet. App. 45-46.

In 1969, prior to his disability retirement, petitioner began the first of a continuing series of petitions to the Army Board for the Correction of Military Records (the Board). In his first petition, petitioner sought to have three unfavorable OERs removed from his personnel file. The Board reviewed his records and denied the application. In 1970, petitioner applied to the Board seeking promotion to the rank of major. After considering his application and record, the Board transferred petitioner to the Retired Reserve in the grade of major, but without entitlement to retired pay in that higher grade, pursuant to 10 U.S.C. 1371. Pet. App. 47-48.

In July 1979, petitioner applied to the Board for reconsideration of his 1969 and 1970 applications. That request was denied in May 1980. In December 1981, petitioner again requested reconsideration of his 1969 application. The Board denied that request in July 1982. In 1983 and again in 1985, petitioner applied to the Board challenging his 1960 release and requesting promotion to colonel and punitive damages. The Board denied both requests, noting on the second occasion that the application was untimely since petitioner had been aware of the alleged error or injustice since 1960. Furthermore, the Board noted, the passage of 25 years made the relief petitioner requested impractical. Pet. App. 47-48.

2. In May 1985, petitioner filed this suit under the Tucker Act, 28 U.S.C. 1491, in the United States Claims Court challenging his 1960 removal from active duty and his 1970 disability retirement. He sought (1) retroactive reinstatement to active duty at the grade of first lieutenant effective June 24, 1960; (2) constructive promotion to the grade of colonel effective July 3, 1981; (3) recovery of all

back pay, allowances, accumulated benefits and entitlements since June 24, 1960; (4) correction of his 1958-1959 OERs; (5) a setting aside of his 1970 disability retirement; and (6) punitive damages. Pet. App. 49.

The Claims Court granted summary judgment for respondent, concluding that all of petitioner's claims were untimely filed. The court noted that the statute of limitations governing claims over which it has jurisdiction, 28 U.S.C. 2501, bars every such claim unless the complaint is filed within six years after the claim first accrues. Petitioner's claims centered on two separate events, his release from active duty on June 24, 1960, and his subsequent physical disability retirement from the Army Reserve on October 1, 1970. Pet. App. 50 & n.1.

Addressing first petitioner's claims concerning the 1960 discharge, the court stated: "It is well established that a cause of action for back pay and allowances based on an alleged unlawful military discharge first accrues, and accrues all at once, on the date of discharge" (Pet. App. 51). Thus, any claims relating to that discharge accrued on June 24, 1960, much more than six years before the filing of the complaint. The court rejected petitioner's contention that the statute of limitations was tolled by his continual pursuit over a 25-year period of his administrative remedies through petitions to the Correction Board. "The Court of Claims has long held that resort to permissive administrative procedures such as a petition to a corrections board does not toll the statute." Pet. App. 53.

The court also considered at some length (Pet. App. 54-60) and decisively rejected petitioner's contention that the government had concealed material information from him at the time of his 1960 discharge, material that he allegedly uncovered only recently pursuant to the Freedom of Information Act. The court concluded that the Army in 1960 had fully and accurately notified petitioner of the grounds for his discharge, finding that petitioner's con-

trary assertion "strains credulity" (Pet. App. 59). The court went on to state (*id.* at 60):

> It is clear from the record that the Army did not conceal any critical facts that would keep the plaintiff from knowing that he had a claim against the Army on June 24, 1960, the date of his discharge from active duty. Plaintiff was aware at the time of his discharge of the reasons why he was discharged.

Turning to petitioner's claims relating to his 1970 disability retirement, the court found it "clear from the context of the complaint" that petitioner meant those claims to be conditional. That is, "he only wants such relief if the Court were willing to void his 1960 discharge and place [him] back on active duty. Conversely, he does not want his disability retirement pay tampered with if the Court denies his request for reinstatement." Pet. App. 61. In any event, the court noted, these claims all accrued in 1970, at the time of the disability retirement, and were therefore also untimely (*id.* at 62).

The Court of Appeals for the Federal Circuit affirmed in an unpublished per curiam opinion (Pet. App. 3-4). The court of appeals noted that the Claims Court had dismissed the case as barred by the statute of limitations. "Finding no error in that decision, we affirm on the basis of the Claim Court's opinion" (*id.* at 4 (emphasis omitted)).

3. Petitioner reiterates his contention (Pet. 29-40) that the statute of limitations should have been tolled on his 1960 wrongful discharge claim because the Army assertedly concealed material information from him concerning the true reasons for that discharge. This contention was fully considered and properly rejected by the Claims Court, and its decision was in turn affirmed by the court of appeals. Such a fact-bound and apparently frivolous claim does not merit this Court's attention.

Petitioner further contends (Pet. 40-47) that he is entitled to judicial review of decisions of the Correction Board denying his claims, and that his complaint was timely filed because at least a few of those decisions were less than six years old. Apparently, petitioner assumes (*id.* at 46-47) that he is entitled to such review under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702. That provision generally provides a cause of action for judicial review of final agency action. Section 702 explicitly states, however, that an action may be brought thereunder only if it is an action "seeking relief other than money damages." Because Section 702 does not waive sovereign immunity for actions seeking money damages, petitioner's cause of action for back pay, allowances, accumulated benefits, entitlements and punitive damages necessarily accrued at the time of his allegedly wrongful discharge in 1960. The APA cannot revive such a stale claim.

Nor can petitioner's continual resort to the Correction Board be said somehow to have tolled the statute of limitations. Jurisdiction in this case was expressly predicated on the Tucker Act. The Federal Circuit, which has exclusive appellate jurisdiction over all such claims (28 U.S.C. 1295(a)(2)), does not require a plaintiff to apply to a Correction Board before seeking money damages in court under the Tucker Act on a claim of wrongful discharge. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Eurell* v. *United States*, 566 F.2d 1146, 1147-1148 (Ct. Cl. 1977). Thus, petitioner's cause of action for money damages properly accrued at the time of the allegedly wrongful discharge and was not tolled by his pursuit of permissive administrative remedies. *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953).

To permit a person seeking to challenge his discharge to revive a stale claim for money damages by the simple expedient of applying first to the Correction Board, and then, following a denial of his claim by the Board, bringing a Tucker Act suit, would effectively eliminate the statute of limitations as a bar to ancient claims for money damages. Over the past 25 years the Federal Circuit and its predecessor, the Court of Claims, have repeatedly rejected such attempts, and this Court has consistently declined to review those decisions. See *Pacyna* v. *Marsh,* 809 F.2d 792 (Fed. Cir. 1986) (Table), cert. denied, No. 86-1136 (May 18, 1987); *Bonen* v. *United States,* 666 F.2d 536, 539 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Ramsey* v. *United States,* 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979); *Brundage* v. *United States,* 504 F.2d 1382, 1385 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975); *Friedman* v. *United States,* 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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